Supreme Court, U.S.
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No. 95- ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

TED MARK MONK,
Petitioner,

v.

QUALITY ELECTRIC SUPPLY COMPANY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

When the Virgin Islands Legislature duly enacts legislation adopting the restatement of law as approved by the American Law Institute as the rules of decision for the Virgin Islands may the Third Circuit Court of Appeals, when applying the Virgin Islands law, nonetheless read into the restatement a proviso that had been rejected by the American Law Institute and make this rejected proviso the rule of decision for the Virgin Islands merely because it considers this "the better rule."

II

May the Third Circuit Court of Appeals, in applying Virgin Islands law, disregard duly enacted legislation of the Virgin Islands Legislature specifically permitting injured workers to sue anyone responsible for their injuries and bar such suits by the injured workers against a special class merely because the Circuit believes this would be "a better rule".

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OPINIONS

The District Court of the Virgin Islands issued its Memorandum Opinion and Summary Judgment on January 24, 1994.

The United States Court of Appeals affirmed the decision below by Judgment dated April 20, 1995. Petitioner's request for rehearing was denied May 15, 1995.

JURISDICTION

The judgment of the Court of Appeals was entered on April 20, 1995. Petitioner filed for rehearing. On May 15, 1995, the Court of Appeals denied this Petition. The Petition for Certiorari was timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

V.I. Code, Title 1, Section 4.

V.I. Code, Title 24, Section 284.

Restatement (Second) Torts, Section 413.

STATEMENT OF THE CASE

Petitioner Monk sustained electrical burns requiring the amputation of both legs and one arm, while in the course of his employment for Banak Construction Company working on the premises of Quality Electric Co. (hereinafter "Quality"), located in the U.S. Virgin Islands. "Quality" had contracted with Banak, an independent contractor, to re-build its warehouse. Petitioner was an employee of this independent contractor. Petitioner filed suit in the District Court of the Virgin Islands pursuant to 28 U.S.C., 1332(a) against Quality Electric, charging it with breaching its duties for failing to provide special precautions necessary to protect petitioner from peculiar unreasonable risk of harm associated with the construction work pursuant to Section 413, Restatement (Second) Torts. Petitioner also sued Virgin Islands Water and Power Authority charging it with negligent placement of its energized conductors pursuant to 28 U.S.C., 1332(a).

"Quality" moved for Summary Judgment in the District Court alleging that an employer of an independent contractor had no duties to the employees of an independent contractor. The District Court disagreed citing to Section 413 of the Restatement (Second) Torts, which Restatement as approved by the American Law Institute is the "rules of decision" in the Courts of the Virgin

Islands in cases to which it applies in the absence of local laws to the contrary" 1 V.I.C., Section 4. The judge granted "Quality's" Motion, however, by ruling that "Quality" had conformed to its duties under Section 413. *Monk v. Virgin Islands Water and Power Authority*, No. 91-0077 (D.V.I. Jan. 24, 1994). Thereafter, Petitioner appealed to the Third Circuit Court of Appeals pursuant to 28 U.S.C. 1291. That Court affirmed the Summary Judgment *Monk v. Virgin Islands Water and Power Authority*, et al., No. 94-7372, 1995 W.L. 231637 (3rd Cir. April 20, 1995) but on different grounds. It read into Section 413 a bar excluding employees of an independent contractor from the class of persons to whom the employer of an independent contractor owes any duties under Section 413. In reading in such an exclusion to Section 413, thus barring petitioner's suit, the Circuit conceded that the bar it read into 413 had previously been expressly submitted as a draft to the American Law Institute and rather than being *approved* had been *rejected*! It also noted that under Virgin Islands Legislation, only those expressions in the restatements of law *approved* by the American Law Institute would constitute the rules of decision in the Virgin Islands. What the Circuit failed to even mention was that it also disregarded specific legislation enacted by the Legislature of the Virgin Islands in its Workmen's Compensation Act that specifically authorized such suits. "[A]n injured employee may sue any person responsible for his injuries. . ." Title 24 Virgin Islands Code Section 284(b)

The Third Circuit's basis for its total disregard for Virgin Island legislation was that it considered that imposing such a bar would be "the better rule."

Petitioner, after being denied a rehearing or rehearing en banc on May 15, 1995, filed this timely petition for a writ of certiorari, pursuant to 28 U.S.C. 1254(1).

REASONS FOR GRANTING THE WRIT

The United States Congress enacted the Revised "Organic Act of the Virgin Islands" on July 22, 1954, Ch. 558, § 1, 68 Stat. 497. This Act created the "Legislature of the Virgin Islands" and granted it legislative power as follows: "(a) The legislative authority and power of the Virgin Islands shall extend to all rightful subjects of legislation not inconsistent with this Act or the laws of the United States made applicable to the Virgin Islands, . . ." July 22, 1954 Ch. 558, § 8, 68 Stat. 500. Pursuant to the authority granted it by Congress the Legislature enacted 1 V.I. Code, Section 4 (1967) which provides:

> The rules of the common law, as *expressed* in the restatements of the law *approved* by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary. (Emphasis suplied.)

Also, pursuant to the authority granted it by Congress the Legislature of the Virgin Islands enacted a Workmen's Compensation Act. 24 Virgin Islands Code § 251, *et seq.* In 1986 it amended § 284 of Title 24 to read as follows:

> (b) For the purposes of this section, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to comply with the provisions of this chapter with respect to being an insured employer. The "statutory employer and borrowed servant" doctrine are not recognized in this jurisdiction, and an injured employee may sue any person responsible for his injuries other than the employer named in a certificate of insurance issued under section 272 of this title.

Noteworthy is the Third Circuit's prior acknowledgment of this legislative enactment and its purpose:

> . . . to assist persons who are injured on the job and to assist the Department of Labor Workmen's Compensation Division in recouping monies it has expended on injured workmen from the *wrongdoer* (emphasis supplied) Bill No. 498, 16th Legislature (1986) *Nieves v. HOVIC*, 819 F.2d 1237, 1248 (3d Cir. 1987).

It is immediately apparent that the Virgin Islands Legislature clearly manifested its policy of eliminating any obstacles impeding injured workers, such as petitioner from suing "any person responsible for his injury." Most unfortunately the Third Circuit chose to disregard this legislation in petitioner's case. In rejecting petitioner's suit under Section 413 of Restatement (Second) Torts, it chose to read in an exception to the duty of the employer of an independent contractor under Section 413 Restatement (Second) Torts.[1] It chose to exclude the injured employees of the independent contractor from the ambit of duty imposed on the employer of such independent contractor. Such an exclusion is not *expressed* in the provisions of the Restatement (Second) Torts *approved* by the American Law Institute. The Virgin Islands Legislature specifically adopted the restatements of the law *approved* by the American Law Institute. Incredibly, the Circuit adopted the bar, in part because just such a bar had been proposed to the American Law Institute. However, the Circuit conceded that the American Law Institute rather than *approving* such proposed

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[1] § 413 Duty to Provide for Taking of Precautions Against Dangers Involved in Work Entrusted to Contractor.

One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken is subject to liability for physical harm caused to them by the absence of such precautions if the employer (a) fails to provide in the contract that the contractor shall take such precautions, or (b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions.

bar *rejected* it! Thus, the Circuit disregarded the specific provisions of 1 V.I. Code, § 4 (1967) enacted by the Virgin Islands Legislature. Ironically, in inserting the bar in Section 413, the Circuit reasoned that to bar such suits would be compatible with Workmen's Compensation Statutes in some other jurisdictions which preclude injured employees from recovering against the independent contractor. Of course, the Circuit refused to consider the language of the Virgin Islands Workmen's Compensation Act that specifically permits an injured employee to sue *any person responsible* for his injuries.

In sum, the Third Circuit adapted an exclusion to Section 413 Restatement (Second) Torts rejected by the American Law Institute even though the Virgin Islands Legislature adopted the Restatement only as *approved* as the rules of decision for the Virgin Islands. And, most egregiously, the Circuit disregarded positive law enacted by the Virgin Islands Legislature empowering injured workers to sue any person responsible for his injuries and substituted its *ukase* that it would bar suits by an injured worker against the employer simply because they considered that "the better rule!"

Petitioner concedes that the Virgin Islands is a mere colony/territory of the United States. However, petitioner is unable to find any provision in the United States Constitution or in the positive law enacted by the United States Congress that grants the Third Circuit Court of Appeals authority to disregard duly enacted legislation of the Virgin Islands and substitute its opinion as to what "is the better rule." Petitioner was unsuccessful in convincing the Third Circuit that this was a usurpation of power, perhaps this Honorable Court can point out to it the error of its ways, hence this petition and the reasons for granting it.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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